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Legislation and Administration: Courts -- Criminal Procedure -- Production of Statements and Records Made by Government Witness to Government Agents

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LEGISLATION AND ADMINISTRATION

COURTS — CRIMINAL PROCEDURE — PRODUCTION OF STATEMENTS AND RECORDS MADE BY GOVERNMENT WITNESS TO GOVERNMENT AGENTS. PUB. L. No. 269, 85th Cong., 1st Sess. (Sept. 2, 1957).—A good deal of concern, both on the part of the general public and the Government, coupled with some confusion in the lower federal courts, followed in the wake of the controversial decision of the Supreme Court in *Jencks v. United States,* 353 U.S. 657 (1957). Jencks was prosecuted for filing a false non-communist affidavit with the NLRB. At the trial, after two incriminating government witnesses had testified, the defense moved that reports made by the witnesses to the F.B.I., and mentioned in their testimony, be given to the trial judge for a determination of their evidentiary value for impeachment purposes. The trial judge denied the motion, and the court of appeals affirmed on the primary ground that the defense had not laid a preliminary foundation of inconsistency. *Jencks v. United States,* 226 F.2d 540 (5th Cir. 1955). On certiorari, the Supreme Court reversed the conviction. A preliminary foundation of inconsistency was unnecessary and the trial judge's refusal to grant the defendant's request as to material related to witnesses' testimony was erroneous. *Jencks v. United States, supra.*

The broad language in the decision led to varying interpretations in the lower federal courts. Pre-trial disclosure of reports made by prospective government witnesses was required by a district court which interpreted *Jencks* as aimed at reducing to a "minimum the possibility of a defendant being taken by surprise by the testimony of a governmental witness during the trial. . . ." *United States v. Hall,* 153 F. Supp. 661, 663 (W.D. Ky. 1957). When an F.B.I. agent, under orders from the Attorney General, refused to comply with the order to produce certain documents in his possession for examination by defendants, he was held in contempt by the court and fined $1,000. *United States v. Hall, supra.*

In another federal court, one judge ruled that *Jencks* requires the disclosure of the government's entire investigative file to the defendant before trial, *United States v. Young* (S.D. Tex. 1957), while still another judge restricted his order to relevant statements and reports to be submitted after the witnesses had testified. *United States v. Parr* (S.D. Tex. 1957). These and other unreported rulings concerning interpretations of the *Jencks* decision are collected and analyzed in 103 CONG. REC. 14551-54 (daily ed. Aug. 26, 1957).

To eliminate the confusion and to protect government files, an act was passed in the final days of the First session of the Eighty-fifth Congress instituting an exclusive procedure for handling demands for the production of statements and reports of witnesses made to government agents. The act is designed not only to protect individual rights and confidential government information, but also to prevent unauthorized extension of the *Jencks* holding by lower courts. U.S. CODE CONG. & AD. NEWS 2949-50 (1957).

The act provides that no statement or report in possession of the government, made by a government witness or prospective government witness, other than the defendant, to an agent of the Government, shall be subject to disclosure in the criminal prosecution until the witness

has testified upon direct examination at the trial. It then establishes procedures, which will be examined in detail, for production of such documents when this stage of the trial is reached. It further provides that, if the Government should refuse to comply with an order for production made pursuant to this act, the trial court shall strike from the record the testimony of the witness or may, in the interest of justice, declare a mistrial. U.S. CODE CONG. & AD. NEWS 2949-50 (1957).

The effect of this statute on the holding in *Jencks* requires an examination of its provisions in the light of that decision and the statute's legislative history. The statute is divisible into three parts, namely, (1) when the defendant shall receive any statements, (2) the role of the trial judge in determining what statements shall be given to the defendant, and (3) the scope of the term "statement" as used in the act.

When the defendant shall receive any statements. The act provides that no statements or reports are to be produced until after the witness has testified upon direct examination. To insure fairness to the defendant, the statute expressly gives the trial court power to grant a recess upon production so that the defense may adequately examine and prepare the material for subsequent use in the trial. U.S. CODE CONG. & AD. NEWS 2950 (1957). The defense in *Jencks* had made no demands until after the government witnesses had testified upon direct examination; therefore, this provision does not in any manner violate the specific holding of the case.

Controversy arose in the Senate as to the effect of this provision upon the existing rules regarding discovery in criminal cases, especially FED. R. CRIM. P. 16 and 17. Originally, the Senate bill expressly excluded the federal rules of criminal procedure from its operation. The exclusionary provision was designed to prevent the statute from having any effect upon the existing criminal discovery rules, but there was considerable disagreement as to the most appropriate way to accomplish this end. *Compare* 103 CONG. REC. 14537 (daily ed. Aug. 26, 1957) *with* 103 CONG. REC. 14538-39 (daily ed. Aug. 26, 1957). The Government attacked the exclusionary provision as encouraging the courts to re-interpret the rules relating to pre-trial disclosure so as to include material to be furnished under the *Jencks* rule. 103 CONG. REC. 14532-41 (daily ed. Aug. 26, 1957). Generally, this had not been the situation prior to *Jencks* since the disclosure provisions pertained only to material admissible into evidence, while the admissibility of prior statements for the purpose of attacking the credibility of a witness could be determined only after the witness had testified. *United States v. Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954). One court, however, had already interpreted *Jencks* as extending the federal rules. *United States v. Hall, supra.* Both sides disclaimed any intention of tampering with the existing discovery rules, but differed on how to accomplish this result and yet prevent recurrences of the *Hall* situation. The Government prevailed in the House bill while the result of the conference on disagreeing votes was substantially the Senate bill, but without the qualifying "federal rules" phrase. U.S. CODE CONG. & AD. NEWS 2949-50 (1957). Thus, while Congress has disclaimed any change in the rules made by the present statute, it has also denied any change resulting from extensions of *Jencks,* and reaffirmed the pre-*Jencks* status quo in interpretation of the federal rules. This seems the better

view, and would probably have been corrected by the courts themselves in due course.

The role of the trial judge in determining what statements shall be given to the defendant. The correctness of allowing the trial judge to determine what statements shall be produced on the grounds of admissibility was not in issue in *Jencks,* but the Supreme Court's readiness to volunteer advice on this question, *Jencks v. United States, supra* at 669, has given rise to the misconception that the trial judge is forbidden to exercise any discretion in determining what statements of a witness need be produced. However, what the Court is actually doing is disapproving the practice whereby the trial judge makes a determination that the statements are admissible for impeachment purposes before the statements are given to the defendant. Such was the practice in some courts, especially in the Second Circuit, *United States v. Krulewitch,* 145 F.2d 76 (2d Cir. 1944), and such was the procedure the defendant desired in *Jencks.* While *Jencks* is not entirely clear on the role of the trial court, a careful reading of the opinion would indicate that the Court is referring to statements which relate to the subject matter of the witness' testimony when speaking of statements which must be given directly to the defendant. *Jencks v. United States, supra* at 669. This necessarily presupposes a determination of relationship by someone, presumably the trial judge, before any material is given a defendant.

The statute quite reasonably provides that when the government contends that any statement requested by the defendant is not wholly related to the subject of the testimony of the witness, the trial judge may excise any unrelated material and direct delivery of the remainder to the defense. If the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement will be submitted to the appellate court upon appeal for final determination of the trial court's ruling. U.S. CODE CONG. & AD. NEWS 2950 (1957).

The trial court makes no decisions as to admissibility, however, until the defendant attempts to introduce the material for impeachment purposes. It is therefore acting in accord with the views enunciated by the Supreme Court in *Jencks.* The objects based upon relevancy, materiality, and competency should not be heard when the trial court first entertains a motion whereby the defendant seeks to obtain prior statements made by government witnesses, but only when the defendant endeavors to use them for impeachment purposes. *Jencks v. United States,* 353 U.S. at 669.

The scope of the term "statement" as used in the act. Statements to be produced under the statute are defined in section (e) as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

However, section (e), by its express provisions, has no application to section (a) which prohibits any "statement or report" to be disclosed

prior to the testimony of the witness on direct examination. Herein is where the most serious objections to the statute is likely to be raised.

The original bill, 103 CONG. REC. 14417 (daily ed. Aug. 23, 1957), passed by the Senate included "transcriptions or records of oral statements" within the definition of "statement," although the Department of Justice strongly advocated substituting the word "recordings" for "records." The bill's proponents claimed that the word "recordings" was too narrow and technical a word, while the Government said that "records" was too broad, laying open complete files of the Government's working papers and memoranda. 103 CONG. REC. 14543-47 (daily ed. Aug. 23, 1957). Though defeated in the Senate, the Government was once again successful in the House with the result that, when the revised bill came out of the conference on disagreeing votes, the Government's suggestions were substantially embodied in the revised version of the Senate bill finally passed by both Houses. At the same time, section (e) (2) seems to eliminate the objection which the sponsors of the original bill had to the unqualified use of "recordings." It is significant that Senator O'Mahoney, sponsor and manager of the original bill, and one of the conferees on the disagreeing votes, thought the new language acceptable, in that it was broad enough to include memoranda of oral statements and in no way limited the term so as to invade due process. 103 CONG. REC. 15054 (daily ed. Aug. 29, 1957).

As for *Jencks* "reports written and when orally made as recorded by the F.B.I." are required to be produced. Whether the "substantially verbatim" requirement of section (e) unduly restricts the material to be produced will be a close question; but, in view of the legislative history of the act, one which should be resolved in favor of the validity of the statute. Certainly, given the facts of *Jencks,* the same result would have been reached under the statute. The language of the Court would seem to call for no more than "substantially verbatim" statements.

The tone of the congressional proceedings leading to the passage of this statute, in spite of no small concern for the F.B.I. files, appears to have been one of scrupulous observance of the rights of a defendant in light of the *Jencks* rule, while providing for an orderly procedure for implementing the decision and preventing its unauthorized extension by the courts. Although the remedy provided by the statute should the Government fail to comply is perhaps not as drastic as the dismissal of the action required in *Jencks,* it seems adequate and certainly not violative of the spirit of the decision. The act, in view of the facts of *Jencks* and of its own legislative history, seems well suited to achieve the ends pursued by the Supreme Court while giving due consideration to the Government's proper interest in safeguarding its files.

Robert E. Curley, Jr.

SALES—RETAIL INSTALLMENT SALES ACT—NEW YORK PROVIDES ADDITIONAL PROTECTION TO INSTALLMENT BUYERS. On October 1, 1957, *all* installment buyers in New York came under the protection of the Retail Installment Sales Act. N.Y. UNCONSOL. LAWS c. 599, §§ 401-18

(McKinney 1957). The present statute is designed to provide full disclosure of the contract terms to the purchaser. To facilitate this purpose all terms of the contract are required to be set forth in at least eight point type [sample: eight point type]. The fact that it is a retail installment contract or credit agreement must be stated in ten point bold type [sample: ten point type]; any required balloon payment must be similarly highlighted. Also, any acknowledgment by the buyer of delivery of the copy of the contract must be in ten point bold type. The act controls credit service charges on both retail installment contracts and on retail installment credit agreements, and any refinancing agreement or consolidation of installment contracts. There must be notice to the buyer that he is not to sign if there is a blank space, that he is entitled to a copy of the contract or agreement, and that he has a right to prepay and receive a proportionate rebate on the credit service charge. To set off such information there must be a statement "NOTICE TO THE BUYER" in at least eight point bold type. Willful violation of the act *may* subject the seller to a fine of $500.00 and any failure to comply *allows* the buyer to recover the credit service charge and the amount of any delinquency or refinancing charge.

Formerly, the State of New York regulated an installment sale only where it involved a conditional sales contract, a chattel mortgage, or a contract for the bailment or leasing of goods in which the bailee or lessee may become the owner. N.Y. PERS. PROP. LAW § 64(a); N.Y. LIEN LAW § 239(i) (chattel mortgage). This act regulates every installment sale. Furthermore, the act applies to retail credit agreements, or revolving credit plans, in which the seller extends a certain amount of credit over a period of time which is diminished by monthly payments with a carrying charge.

Few states have specific point type requirements in statutes regulating installment sales of consumer goods. Massachusetts requires that specific terms be set forth in a least eight point type. MASS. ANN. LAWS c. 255, §§ 12, 12A (1956). In Maryland the acknowledgment of delivery of a copy of the instrument and statements of the buyer's rights to a copy of the agreement, to prepayment, and to redemption or resale in case of repossession must be in twelve point bold type. MD. ANN. CODE art. 83, §§ 116, 117 (1951). Requirements in Illinois as to point type are similar to those in New York. ILL. ANN. STAT. c. 121½, §§ 224, 226 (Smith-Hurd Supp. Aug. 1957).

The amount of installment credit outstanding on chattels personal, excluding automobile credit, has increased from $1,918,000 in 1939 to $3,754,000 in 1948, and in August 1957, outstanding credit equaled $9,714,000. Joint Economic Committee, *Economic Indicators,* 85th Cong., 1st Sess. 28 (Oct. 1957). Among those to whom credit is given are some who overextend themselves because they fail to comprehend completely the terms of the agreement or because they mistake their financial ability to meet these terms. The magnitude of the sum and the trend toward increasing credit extension suggest the need for regulation.

A buyer should be fully informed so that he is able to make a rational judgment as to whether a particular installment purchase is wise in his case. In response to the rapid increase in installment purchases, several states have enacted statutory controls to assist in protecting the install-

ment buyer of chattels personal. CONN. GEN. STAT. §§ 6698-6704 (1949), as amended, §§ 2862d-68d (Supp. 1955); IDAHO CODE ANN. § 64-806 (Supp. 1957); ILL. ANN. STAT. c. 121½, §§ 223-53 (Smith-Hurd Supp. Aug. 1957); IND. ANN. STAT. §§ 58-901 to -908 (1951); MD. ANN. CODE art. 83, §§ 116-40 (1951); MASS. ANN. LAWS c. 255, §§ 11-13H (1956); N.J. STAT. ANN. §§ 17:16B-1 to -12 (1937), as amended, §§ 17:16B-3 to -6 (Supp. 1956); OHIO REV. CODE ANN. §§ 1316.01 -.99 (Page 1953); UTAH CODE ANN. § 15-1-2A (Supp. 1957).

Under the New York statute, a retail installment contract must identify the parties and the goods or services involved, and must set out the amount of the cash sales price, the down payment, the insurance cost specifying the coverages, the official fees, the principal balance, the credit service charge, the time balance, and the time sales price. Also, it must show the number of installments required, the amount of each installment, and the due date thereof. N.Y. UNCONSOL. LAWS c. 599, § 402 (McKinney 1957). If the seller were allowed to lump the cost of the goods with the various charges involved, the average buyer would be unable to determine whether or not he was treated fairly. Such practice makes it possible for the dealer to pack the contract with questionable fees and overcharges.

If any insurance is included in the contract, the amount of the premiums shall not exceed the rates filed with the superintendent of insurance. Where the seller procures the insurance, he must mail or deliver to the buyer a notice thereof within thirty days after delivery of the goods. N.Y. UNCONSOL. LAWS c. 599 § 402 (McKinney 1957). These provisions apply also to retail installment credit agreements. N.Y. UNCONSOL. LAWS c. 599 § 413 (McKinney 1957). Ohio has afforded the buyers more comprehensive protection in this area. In Ohio the buyer is not liable for installments until he has received a copy of the insurance policy or a certificate of insurance. If there is a difference between the lawful premium and the premium charged, the buyer may deduct three times this difference from the amount actually owed. OHIO REV. CODE ANN. § 1317.05 (Page 1953).

Another protective measure of the New York statute requires the seller to deliver an executed copy of the contract to the purchaser. Until delivery is made a buyer who has not received the goods or services has an unconditional right to cancel the contract and receive immediate refund of all payments. N.Y. UNCONSOL. LAWS c. 599 § 405 (McKinney 1957). Where the parties enter into a credit agreement, the seller may not avail himself of the service charge allowed until he has delivered a copy of the executed agreement to the buyer. N.Y. UNCONSOL. LAWS c. 599 § 413 (McKinney 1957). Maryland provides broader protection in regard to installment sales. The seller must deliver an exact copy of the contract at the time the buyer signs, and a copy executed by both parties must be delivered within fifteen days. Failure to comply renders the agreement absolutely void, and an immediate return of all payments must be made. MD. ANN. CODE art. 83, § 116(b) (1951). Illinois has excluded the catalog mail order seller from this provision because the terms of the sales contract can be found in the catalog. ILL. ANN. STAT. c. 121½, § 230 (Smith-Hurd Supp. Aug. 1957).

Also, the New York act places a ceiling on credit service charges in an

installment contract or installment credit agreement. Section 404 limits the credit service charge of an installment contract to $10.00 per $100.00 per annum so long as the principal balance does not exceed $500.00, and a charge of $8.000 per $100.00 per annum on the principal balance in excess of $500.00. In section 413, the service charge on a revolving credit account is limited to 1½% per month on the unpaid balance not exceeding $500.00. Above that figure the limit is 1% per month. The above two sections also provide that no fee, expense or other charges shall be taken or contracted for unless specifically provided by the act. The service charge includes all charges for investigating and making the contract or agreement and for extending the credit which is thereby provided. Though not all states with legislation in this area have set controls over service charges, it appears that these limitations are desirable; the needy purchaser is thereby protected from the unconscionable charges which he may accept from high pressure salesmen.

Recently a Los Angeles merchant stated his business increased 40% when he began advertising that one could buy his product without any increase in monthly payments being made on previously purchased items. 20 Consumer's Reports 436 (Sept. 1955). The agreement with the merchant would provide a longer time span in which such payments must be made, and would stipulate that all items previously purchased and which are being refinanced with the merchant together with the newly purchased item may be repossessed in any case of default. However, under section 410 of the New York statute the previously purchased goods may only be security for the new purchase until the previous contracts are fully paid or 20% of the time sale price of the new purchase has been paid, whichever occurs first.

Section 403 of the New York statute insures protection for the buyer by making void certain specified provisions to a contract which would place the seller in a controlling position. Also, a waiver by the buyer of any part of this statute is void under section 416. However, New York has failed to regulate the taking of collateral security by the seller. Maryland requires that the contract state clearly any collateral security taken thereunder. MD. ANN. CODE art. 83, § 117 (1951). Illinois provides that any provision in a contract granting the seller title or a lien on goods, other than those being purchased, shall be unenforceable.

The penalty provision of the New York act, section 414, subsection 3, states that any failure to comply with the statute may be corrected within ten days after the buyer notifies, in writing, the holder of the contract. If it is so corrected, no penalty is levied. This subsection is subject to two interpretations. First, the section may be interpreted so that the seller or the holder of the contract is construed to have an absolute right to notification by the buyer and a corresponding right to correct any deficiencies in the contract; thus the seller may avoid any civil or criminal penalty for his willful violation of the act. But this interpretation, while warranted by the words of the statute, will probably not be sustained, for the purposes of this statute, a remedial one, would thereby be defeated. Secondly, the statute may be interpreted so that the seller, if he is notified by the buyer of the failure of the contract to meet the statutory requirements, has a right to correct the reported deficiencies. Any correction of the contract within ten days after notification places the seller

out of the reach of the penalties provided for non-compliance. The latter of the above interpretations does not seem to be in accord with the remedial nature of the statute. The seller who does not comply with the statute may avoid the penalties provided by encouraging his customers to notify him first of deficiencies in the contract. This would appear to be a natural course of action. If he is successful in this attempt, or if, fortuitously, the buyer complains to the seller rather than to the police or other authorities, the seller has a right to correct and to avoid penalties which may attach.

The Retail Installment Sales Act as passed in New York is a worthwhile piece of legislation. Its coverage as to types of contract is broad, and the requirements which must be met under the contracts included are as far-going as seen in any similar legislation to date. However, the strength of the statute is diluted by the subsection which permits a seller to escape the penalties in the event that he is notified by the buyer of any failure to comply with the contract. A buyer who has been duped by the unscrupulous seller at time of contracting may, by merely complaining (in writing) of the deficiency to the seller, release the latter from the penalties provided and divest himself of remedies which otherwise are his under the statute.

J. A. Durkin

TORTS—TORT-FEASORS—RELEASE OF ONE TORT-FEASOR NOT A RELEASE OF ALL TORT-FEASORS WHO MAY BE LIABLE FOR THE SAME TORT.—A recently enacted Florida statute permits the release of one tort-feasor without having the effect of releasing all tort-feasors. It provides that "a release or covenant not to sue as to one tort-feasor for property damage to, personal injury of, or the wrongful death of any person" does not operate as a discharge of liability of any other tort-feasor who may be liable for the same tort. However, the consideration received for a release or covenant not to sue must be set-off from the amount of the final judgment which the plaintiff may receive in any subsequent action against remaining tort-feasors. FLA. STAT. § 54.28 (1957).

Historically, the release of one trespasser discharges all who participated in the trespass. *Cocke v. Jennor,* Hob. 66, 80 Eng. Rep. 214 (K.B. 1614). Prior to the statute this doctrine prevailed in Florida, *Atlantic Coast Line R.R. v. Boone,* 85 So. 2d 834 (Fla. 1956), and it still prevails in most states. PROSSER, TORTS § 46, at 243 (2d ed. 1955). The reason is that an injured party is allowed but one satisfaction for his claim. Each joint tort-feasor is considered to sanction the acts of the other, making them his own. Consequently, each becomes liable for the entire damage; therefore, a release or discharge of one tort-feasor extinguishes the entire claim, leaving nothing for which the other tort-feasor can be liable. *Roper v. Florida Public Utilities Co.,* 131 Fla. 709, 179 So. 904 (1938). It is the policy of the law to prevent double recovery. *J. E. Pinkham Lumber Co. v. Woodland State Bank,* 156 Wash. 117, 286 Pac. 95, 100 (1930).

Because of a highly technical distinction, a covenant not to sue does

not release other joint tort-feasors. If the construction of the instrument does not indicate an intention to fully compensate for the injury, there is no release, but only a covenant not to sue. *Matheson v. O'Kane,* 211 Mass. 91, 97 N.E. 638 (1912). The new Florida statute has not changed this rule.

The strict application of the common law release doctrine has resulted in harsh decisions. An express reservation in a release of a claim against a remaining tort-feasor has been disregarded. *Atlantic Coast Line R.R. v. Boone, supra.* Inadequacy of the consideration for the release to compensate for the loss has been held no bar to extinguishment of the claim. *Hawber v. Raley,* 92 Cal. App. 701, 268 Pac. 943 (1928). These decisions are logically compelled by the rationale of the doctrine. Some courts have ameliorated the harshness of the rule by validating an express reservation in the release of the right to sue remaining tort-feasors. *Adams Express Co. v. Beckwith,* 100 Ohio St. 348, 126 N.E. 300 (1919). In *Safety Cab Co. v. Fair,* 181 Okla. 264, 74 P.2d 607 (1937), it was held that when the terms of the release indicate that the parties did not intend to release the entire claim, parol evidence is admissible to clarify their intention. These decisions represent erosions of the common law doctrine.

A departure from the common law of release is a most needed law reform because (1) the rule stifles expeditious settlements—each joint wrongdoer is inclined to wait for the other to settle first; (2) the defendant is given an advantage inconsistent with the nature of his liability; (3) a wrongdoer who makes no attempt to settle is rewarded at the expense of one who makes partial satisfaction; (4) a trap is set for an innocent plaintiff whereby he may be deprived of full compensation. See *McKenna v. Austin,* 134 F.2d 659, 662 (D.C.Cir. 1943).

In view of the traditional reluctance of the judiciary to overturn firmly rooted precedents, and of the uncertainty associated with such a process, the appropriateness of legislation as a means of altering this situation is self-evident. It is not surprising, therefore, that movements to promote such legislation have been under way in the states for many years.

In 1936 the New York State Law Revision Commission recommended legislation providing that the release of one tort-feasor does not release any of the others. SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION 701-02 (1936). The recommended release provision was presented together with a section pertaining to contribution among tort-feasors as a proposed amendment to the existing debtor and creditor chapter of the New York statutes. The Commission has renewed its recommendations in subsequent years, *e.g.*, REPORT OF THE LAW REVISION COMMISSION FOR 1952 21-23, but to no avail.

Significantly, all states, with the exception of Florida, which have expressly changed the common law of release by statute also recognize contribution. Although closely connected, release and contribution are distinct concepts with no essential relationship. Contribution concerns the compulsory apportionment of damages among tort-feasors, whereas release involves the private settlement of claims against a particular tort-feasor.

The National Conference of Commissioners on Uniform State Laws has been more successful than the New York Commission in promoting

reform in this area. The UNIFORM CONTRIBUTION AMONG TORT-FEASORS ACT § 4 provides that the release, whether before or after judgment, of one tort-feasor does not discharge any other unless the release so provides, but reduces the claim against the other tort-feasors to the extent of the consideration given for the release. The act has been adopted in eight jurisdictions. See ARK. STAT. ANN. § 34-1004 (1948); DEL. CODE ANN. tit. 10, § 6304 (1953); HAWAII REV. LAWS § 10490 (1945); MD. ANN. CODE art. 50, §23 (1951); N.M. STAT. ANN. § 24-1-14 (1953): PA. STAT. ANN. tit. 12, § 2085 (Purdon Supp. 1956); R.I. PUB. LAWS 1940, c. 940 § 4; S.D. CODE § 33.04A05 (Supp. 1952).

Michigan, Missouri and West Virginia have statutes which, although differing in terminology from the Uniform Act, operate similarly. MICH. STAT. ANN. § 27.1683 (2) (Supp. 1955); MO. REV. STAT. § 537.06 (1949); W. VA. CODE ANN. § 5481 (1955).

An unusual Louisiana statute provides that "the remission or conventional discharge in favor of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter." LA. CIV. CODE ANN. art. 2203 (West 1952). A release of a tort-feasor falls within the purview of this article, *Guarisco v. Pennsylvania Cas. Co.*, 209 La. 435, 24 So. 2d 678 (1946).

The MODEL JOINT OBLIGATION ACT § 1 defines the term obligor to include a tort-feasor. This act permits the release of one tort-feasor without discharging the others, provided that an express written reservation of rights accompanies the release. *Id.* § 4. New York adopted this act in 1928 as N.Y. DEBT. & CRED. LAW §§ 231-41. The release provision proposed by the New York Law Revision Commission in 1936 would have eliminated the stringent provisions of the Model Act. Since the proposal has not been adopted, the New York courts deal with the release problem by holding that when a reservation of rights is contained in a written release, the "release" is treated as a contract not to sue. *Bossong v. Muhleman*, 254 App. Div. 738, 3 N.Y.S.2d 992 (2d Dep't 1938). Wisconsin has adopted the Model Act, WIS. STAT. ANN. §§ 113.01-113.10 (West 1957), and follows the New York construction. *State Farm Mut. Auto Ins. Co. v. Continental Cas. Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953).

The withdrawal and subsequent revision of the Uniform Contribution Act, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK 216 (1955), is evidence that the fusion of a release provision into a contribution statute is an obstacle to its acceptance. Formerly, the act provided that the unreleased tort-feasor could compel contribution from the releasee, while under the 1955 revision the release discharges the releasee's entire liability even for contribution. *Id.* at 223. This is a tacit admission that it is sometimes in the interest of law reform to sacrifice one goal to attain another. Florida does not recognize the right of contribution among tort-feasors. *Crenshaw Bros. Produce Co. v. Harper*, 142 Fla. 27, 194 So. 353 (1940). It is now the only state with a statute explicitly abrogating the common law of release which does not also recognize contribution.

The new Florida statute encourages settlement with a particular defendant for his fair share of the injury because the plaintiff knows that he does not thereby prejudice in any way his case against the

remaining defendants. Pressure is brought on a recalcitrant defendant who refuses to settle out of court because he may be forced to pay a far greater amount than the defendants who are willing to settle, if the case ultimately goes to trial. Formerly, many cases were forced to trial because one defendant's refusal to settle prevented the other defendants from making an appropriate offer. Now that settlements are more feasible a great deal of litigation should be eliminated. Such considerations were major factors leading to its enactment. Letter from Sam Daniels, who drafted a substantial portion of the Florida statute, to the *Notre Dame Lawyer,* Nov. 13, 1957, on file in Notre Dame Law Library.

It is difficult to determine exactly what forces are ultimately responsible for the success or failure of attempts at law reform. Assuming that it is desirable to change the common law rules pertaining to release and contribution, it would be best to view these problems separately rather than as if they were inextricably interrelated. It may be that the failure to make this dichotomy in proposed legislation has been an obstacle to change. If opposition to contribution statutes is insuperable in some jurisdictions it may still be possible to alter the law of release, in order to protect, at least, the injured plaintiff. The prevention of such manifestly inequitable results as that reached in *Atlantic Coast Line R.R. v. Boone, supra,* is a noteworthy accomplishment in itself.

Robert P. Mone